STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 5, 2011
v	No. 295266 Saginaw Circuit Court
LEONARR TIONDRE MOORE, Defendant-Appellant.	LC No. 08-031674-FH

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(*iii*), possession of cocaine less than 25 grams, MCL 333.7403(2)(a)(*v*), three counts of possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, 750.224f. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to 63 months to 8 years for each of the possession of marijuana and cocaine convictions, as a second or subsequent offense, MCL 333.7413(2), 63 months to 10 years for the felon in possession of a firearm conviction, and 2 years for each felony-firearm conviction, which were to run concurrent with each other, but consecutive to the underlying felony convictions. We affirm defendant's convictions, but vacate his sentences for the convictions of possession with intent to deliver marijuana, possession of cocaine, and felon in possession of a firearm, and remand for resentencing.

I. MOTION TO SUPPRESS

On appeal, defendant argues that the trial court erred by denying his motion to suppress the evidence seized from his apartment. We disagree.

A. EVIDENTIARY HEARING

Before trial, defendant moved to suppress the evidence seized in the search of 503 Birch Street, apartment 3. The trial court held an evidentiary hearing on the motion. At the hearing, Saginaw Deputy Sheriff Nathan Van Tifflin, who obtained the search warrants for the apartments in 503 Birch Street, and Saginaw Police Officer Eric Skabardis, a member of the Emergency Services Team (EST) that executed the entry into defendant's apartment, testified.

The officers' testimony hearing established that 503 Birch Street is a two-story residential building divided into three apartments. Apartments 1 and 2 are on the first floor, while apartment 3 is on the second floor. The door to apartment 1, located on the south side of the building and facing Birch Street, has the number "1" next to it. Similarly, the door to apartment 2, located on the west side of the building, has the number "2" next to it, and the door to apartment 3, located on the east side of the building, has the number "3" next to it. Defendant lived in apartment 3.

In March 2007, Van Tifflin conducted an investigation into drug activities at 503 Birch Street. The investigation included a controlled drug buy at apartment 1, which was carried out with the assistance of a confidential informant (CI) and an unwitting individual. After being prepared by Van Tifflin, the CI met the unwitting individual and proceeded to 503 Birch Street. There, the unwitting individual went into apartment 1. After leaving the apartment, the unwitting individual returned to the CI. The CI then met Van Tifflin and turned over some marijuana. The CI told Van Tifflin that the unwitting individual stated the seller was a black male in his twenties known as "E," and that "inside the east entrance door there were surveillance cameras." The CI also told Van Tifflin there were two apartments in the building.

Van Tifflin conducted surveillance of 503 Birch Street during and after the controlled buy. During his surveillance, Van Tifflin was able to drive past the south and west sides of the building, but was unable to get close to the east side because of the large number of people going in the building. From his surveillance points, Van Tifflin was able to observe the numbers "1" and "2" next to the doors on the south and west sides of the building. But he never saw the number "3" next to the door on the east side of the building. Consequently, at the time he obtained the search warrant and when the EST executed the entry into defendant's apartment, Van Tifflin believed there were only two apartments in the building and that the door on the east side was related to apartment 1.

The warrant affidavit and the search warrant described the place to be searched as:

> The entire premises and curtilage, including any and all outbuildings and or structures and common areas associated with a two story, apparently multi-family residence located at 503 Birch Street, Apartment #1, Saginaw, Saginaw County, Michigan, being more fully described as the portion of the residence entrance to which is gained either through a door located on the south side (the front side) of the residence *or a second door located on the east side of the residence* . . . . [Emphasis added.]

The search warrant was executed on March 9, 2007, with assistance from the EST. The EST officers first made entrance through the door on the south side of the building into apartment 1. After the EST officers secured the area, Van Tifflin informed them that the door on the east side was covered under the search warrant. The EST officers then forced entry into the east side door. Upon gaining entry, the officers saw a flight of stairs leading to the second floor and another doorway. Defendant stood unarmed in the middle of the doorway at the top of the stairs. The EST officers immediately secured defendant without incident. As the EST officers did a sweep of the second floor, they saw marijuana, cocaine, a scale with cocaine residue, and a shotgun in plain view. After the EST officers finished the sweep, they realized that the second

floor was a separate apartment because there was no access point from the second floor to apartment 1. At this point, the search stopped. Further examination also revealed that the number "3" was affixed next to the east side door.

After discovering the mistake, Van Tifflin obtained a second search warrant that included apartment 3 as a place to be searched. Only after the second search warrant was issued did the search of apartment 3 resume.

At the conclusion of the evidentiary hearing, the trial court denied defendant's motion to exclude the items seized from apartment 3. It found no evidence that defendant's constitutional rights were violated either intentionally or negligently. And, in any event, it concluded that the search of apartment 3 was inevitable.

B. STANDARD OF REVIEW

A trial court's factual findings on a motion to suppress will not be reversed on appeal unless clearly erroneous. *People v Waclawski*, 286 Mich App 634, 693; 780 NW2d 321 (2009). However, we review de novo any questions of law and the decision on the motion. *Id.*

C. ANALYSIS

On appeal, defendant maintains that the EST's entry into his apartment violated his fourth amendment rights because apartment 3 was outside the scope of the area authorized to be searched by the first search warrant. He further maintains that the inevitable discovery doctrine does not apply because the second search warrant was based on items seen after the unauthorized warrantless entry by the EST. We disagree.

"'For purposes of satisfying the Fourth Amendment, searching two or more apartments in the same building is no different than searching two or more completely separate houses.'" *People v Franks*, 54 Mich App 729, 733; 221 NW2d 441 (1974), quoting *United States v Hinton*, 219 F2d 324, 325 (CA 7, 1955). However, a warrant that fails to specify the specific unit number will not be held to be invalid "[a]bsent a finding . . . that the police officers knew or should have known . . . that the building involved was multi-unit in character." *Id.* at 735.

We find the facts of the present case to be factually similar to those presented for review to the United States Supreme Court in *Maryland v Garrison*, 480 US 79; 107 S Ct 1013; 94 L Ed 72 (1987). In *Garrison*, law enforcement officers obtained a search warrant for an apartment they believed occupied the entire third floor of the building in which it was located. After gaining access to the third floor with the assistance of a person that resided on the floor, the officers entered the third-floor vestibule and encountered the defendant standing in the hallway. The officers observed two open doors that allowed them access to the entire third floor. They entered each door and searched the floor. But, thereafter, they discovered that the two doors led to separate apartments, one of which belonged to the defendant. Immediately after learning that the third floor contained two apartments, the officers suspended the search. But, before the officers learned of their mistake, they had seized heroin, cash, and drug paraphernalia from the defendant's apartment. *Id.* at 81.

In analyzing whether the search of the defendant's apartment was constitutional, the Court stated:

> Plainly, if the officers had known, or even if they should have known, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant. But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate. [*Id.* at 85.]

Ultimately, the Court concluded that the seizure of items from the defendant's apartment was not unconstitutional because the officers carried a warrant to search the third floor and the officers discontinued the search as soon as the error was discovered. *Id.* at 86-87. Further, the Court stated:

> The officers' conduct and the limits of the search were based on the information available as the search proceeded. While the purposes justifying a police search strictly limit the permissible extent of the search, the Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants. [*Id.* at 87.]

From *Garrison*, we conclude that for the entry and search of an apartment in a multiple unit residential structure, which was conducted pursuant to a search warrant authorized by a magistrate, to be declared unconstitutional because of a mistake in the information given to the magistrate, the evidence must establish that the police officers failed to disclose to the magistrate information that they knew or had a "duty to discover and disclose." *Id.* at 85.

In this case, the search warrant issued by the magistrate permitted entry of apartment 1 through the east side door. The reason for authorizing this point of entry was the representation in the affidavit signed by Van Tifflin that apartment 1 was accessed through the south and east side doors. That this information ultimately proved to be incorrect does not alone invalidate the search warrant. The testimony at the evidentiary hearing does not support a finding that Van Tifflin either knew this information was inaccurate or that he had a duty to discover it was wrong. During his surveillance, Van Tifflin was not able to get in close proximity to the east side door and, consequently, he never observed the number "3" that was near the door. And there was no reason for Van Tifflin to risk being discovered by attempting to see the east side door up close when the information from the CI was that the door was a second entrance to apartment 1 and his observation of pedestrian traffic supported the information.

Further, we find no merit to defendant's argument that the entry and sweep of apartment 3 was unconstitutional because Van Tifflin and the EST officers, in the execution of the warrant, failed to discover that the east side door led to a separate apartment before entering and sweeping apartment 3. The primary objective of the initial sweep was to go through the entire apartment to assure that a subsequent search could be safely conducted. To be so assured, the entire premises as described in the search warrant had to be swept. As stated in *Garrison*, 480 US at 87, executing a search warrant is a "dangerous and difficult process." Obligating those carrying out this task to ignore a door specified in the warrant because the sweep of apartment 1 through the south side door had not led them to the east side door is an unrealistic expectation to place on them. The same is true for their failure to note the number "3" next to the east side door or to conclude that they should stop once the east side door had been breached and they were confronted with stairs leading to the second floor. We have no difficulty finding that, pursuant to the search warrant, the EST officers had the authority to sweep and secure the upstairs area before taking the time to evaluate the situation. Accordingly, we reject defendant's argument that the initial entry into his apartment violated his fourth amendment rights.[1]

II. OFFENSE VARIABLES

On appeal, defendant argues that the trial court erred in scoring offense variables (OVs) 1, 9, 14, and 19. We review a trial court's scoring decisions to determine whether the court properly exercised its discretion and whether record evidence supports the scores. *People v Phelps*, 288 Mich App 123, 135; 791 NW2d 732 (2010). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We review de novo constitutional challenges to the sentencing guidelines. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

Defendant first claims that the scoring of the OVs violated his constitutional rights because the facts used to support the scores were not proven beyond a reasonable doubt to a jury. See, e.g., *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, as defendant acknowledges, our Supreme Court has consistently held that the *Blakely* line of cases does not apply to Michigan's indeterminate sentencing scheme. See *People v McCuller*, 479 Mich 672, 686; 739 NW2d 563 (2007); *Drohan*, 475 Mich at 164. Accordingly, defendant's argument is without merit.

Defendant next claims that record evidence does not support the trial court's scoring of OVs 1, 9, 14, and 19. In addition, defendant asserts that OVs 14 and 19 cannot be scored under *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), because the facts used to score them occurred after the sentencing offense was completed. We agree that OV 9 was improperly scored, but find that record evidence supports the scoring of OVs 1, 14, and 19.

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[1] Because we conclude that the entry and sweep of defendant's apartment was not unconstitutional, we need not address the inevitable discovery doctrine.

The trial court scored five points for OV 1, MCL 777.31. Five points may be scored for OV 1 if "[a] weapon was displayed or implied." MCL 777.31(1)(e). The trial court agreed with the prosecutor that five points should be scored because of the number of guns found. Here, the weapons found in defendant's apartment were undoubtedly there as part of his illegal drug activities. The fact that defendant was not armed as the EST officers entered the east side door of the building was fortuitous, but does not overcome the obvious implication that the guns were there for protection of defendant's illegal activities. Therefore, the trial court properly scored OV 1 at 5 points.

The trial court scored ten points for OV 9, MCL 777.39. Ten points is a proper score for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). The trial court accepted the prosecutor's argument that because defendant was in the apartment with his drugs, money, and weapons, the multiple police officers who entered the apartment were placed in danger of physical injury. However, the argument is based on what could have happened, and not on what did happen. Here, defendant was immediately secured after the EST members opened the outside door to apartment 3. An officer ordered defendant to the ground and he complied. Defendant was unarmed and never threatened any police officers. Accordingly, there is no record evidence that defendant placed any police officers in danger of physical injury. The trial court abused its discretion in scoring ten points for OV 9.

The trial court also scored ten points for OV 14, MCL 777.44. OV 14 may be scored at 10 points if the defendant was the leader in a multiple offender situation. MCL 777.44(1)(a). In this case, a large quantity of marijuana, a scale, and baggies were found in defendant's apartment. And, when in jail, defendant had telephone conversations with individuals in which he discussed how his drugs should be sold. This evidence supports the trial court's finding that defendant was the leader of a drug enterprise.

OV 19, MCL 777.49, was scored at ten points by the trial court. Ten points may be scored for OV 19 if the "offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Here, there was evidence that defendant, while in jail, had a telephone conversation with a female named Denise and he asked her to take the charges for him. Further, the search of defendant's apartment revealed that defendant had attempted to flush a bag of suspected cocaine down the toilet. These facts support the trial court's finding that defendant attempted to interfere with the administration of justice.

In addition, defendant's *McGraw* challenge to the scoring of OVs 14 and 19 is without merit. In *McGraw*, 484 Mich at 122, our Supreme Court held that conduct that occurs "after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." The instructions for scoring OV 14 specifically state that "[t]he entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a). The instructions for OV 19 do not contain similar language. However, in *People v Smith*, ___ Mich ___; ___ NW2d ___ (2010), our Supreme Court held that events occurring after the sentencing offense was completed could be used to score OV 19 because the conduct described in OV 19 almost always occurs after the sentencing offense is completed. Therefore, the trial court did not abuse its discretion in scoring OVs 14 and 19 based on defendant's conduct occurring outside the sentencing offense.

Finally, we reject defendant's argument that OV 19 is void for vagueness because its scoring is left to the unfettered discretion of the prosecutor and judge. Statutes are presumed to be constitutional, *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003), and because OV 19 does not implicate defendant's first amendment rights, "[t]he proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case," *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). As previously noted, there was record evidence that defendant attempted to interfere with the administration of justice. Defendant solicited a female acquaintance to say that the drugs were hers, and he attempted to destroy evidence of a crime. Therefore, as applied to defendant's conduct in this case, OV 19 is not unconstitutionally vague.

A defendant is entitled to be sentenced on accurately scored guidelines. *McGraw*, 484 Mich at 131. Where an error in the scoring affects the appropriate guidelines range, a defendant is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006). Here, because the trial court's error in scoring ten points for OV 9 affects the guidelines range, defendant is entitled to be resentenced.[2] Accordingly, we vacate defendant's sentences for his convictions of possession with intent to deliver marijuana, possession of cocaine, and felon in possession of a firearm,[3] and remand for resentencing.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied ineffective assistance of counsel at sentencing because defense counsel failed to make the objections that were later raised in his motion for resentencing and in his appeal to this Court. We disagree.

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Here, defense counsel was not ineffective for failing to raise the objections that defendant raised in his motion for resentencing. There was no established case law supporting defendant's argument that Michigan's indeterminate sentencing scheme violated any constitutional right. In fact, there is a plethora of case law to the contrary. See *People v Seals*, 285 Mich App 1, 18; 776 NW2d 314 (2009). Further, defense counsel objected to the scoring of OVs 1, 9, 14, and 19, and the upward departure. That is all that was required. Defendant was not denied the effective assistance of counsel.

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[2] Resentencing is required despite the upward departure, because the trial court indicated that had the guidelines range been lower the departure may have been lower.

[3] The scoring error does not affect defendant's sentences for the felony-firearm convictions because the two-year sentences are mandated by statute. MCL 750.227b(1).

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot